IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ZURICH AMERICAN INSURANCE COMPANY, et al.	:	
v.	:	Civil No. CCB-06-2055
FIELDSTONE MORTGAGE CO.	:	

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MEMORANDUM

Now pending before the court is a motion to reconsider and/or for certification of a question of law to the Maryland Court of Appeals filed by plaintiffs Zurich American Insurance Company, American Zurich Insurance Company, and American Guarantee & Liability Insurance Company (collectively "Zurich") against defendant Fieldstone Mortgage Company ("Fieldstone"). Relevant to this motion, the court previously granted Fieldstone's request for legal fees and costs associated with successfully defending against Zurich's declaratory judgment action regarding Fieldstone's insurance coverage. *Zurich American Ins. Co. v. Fieldstone Mortgage Co.*, 2007 WL 3268460 (D. Md. 2007). More specifically, the court found that under Maryland law a prevailing insured may recover fees in a declaratory judgment action where the insurer provides a defense for the insured in the underlying litigation, but subsequently and unsuccessfully brings a declaratory action to avoid its obligation. *Id.*[1] Because Zurich has not provided a sufficient basis to alter or amend this ruling, and because certification of this

[1] Only in the sense that Zurich initially provided a defense (the cost of which it then sought to impose on its insured through the declaratory judgment action) did the court note in its earlier memorandum that Zurich had "not 'breached' its obligation." *Zurich American Ins. Co. v. Fieldstone Mortgage Co.*, 2007 WL 3268460, at *7 (D. Md. 2007).

question of law to the Maryland Court of Appeals is not necessary, Zurich's motion will be denied.

Courts have generally recognized three grounds for granting a motion for reconsideration: (1) an intervening change in controlling law; (2) to account for new evidence; or (3) to correct a clear error of law or prevent manifest injustice. *See EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997); *Potter v. Potter*, 199 F.R.D. 550, 552 (D. Md. 2001). Although "there are 'circumstances when a motion to reconsider may perform a valuable function,' . . . it [is] improper to use such a motion to 'ask the Court to rethink what the Court ha[s] already thought through - rightly or wrongly.'" *Potter*, 199 F.R.D. at 552 (quoting *Above the Belt, Inc. v. Bohannan Roofing, Inc.*, 99 F.R.D. 99 (E.D. Va. 1983)). Moreover, in determining whether to certify a question of law to a state court, a federal court should only do so "if the available state law is clearly insufficient." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994). Otherwise, a federal court "should do as the state court would do if confronted with the same fact pattern." *Id.*

The crux of Zurich's argument is that Maryland law does not give an insured the right to recover fees related to successfully defending a declaratory action filed by an insurer who has defended the insured in an underlying action. The court disagrees. Maryland courts have crafted amongst the broadest common law exceptions to the American rule in the liability insurance context, including where the insurer institutes a declaratory action and the insured is successful in his defense. *See Cohen v. Am. Home Assur. Co.*, 258 A.2d 225, 239 (Md. 1969) (noting that a prevailing insured may recover fees in a declaratory judgment action regarding coverage); *Collier v. MD-Individual Practice Assoc.*, 607 A.2d 537, 542 (Md. 1992) (noting that where

liability insurance is involved, the insured may recover fees whether the declaratory judgment action is brought by the insured or the insurer); *see also* 16 COUCH ON INSURANCE § 233:13, n.65 (3d ed. 2000) (generally discussing the Maryland common law exception to the American rule in the liability insurance context). Moreover, in *Brohawn v. Transamerica Ins. Co.*, 347 A.2d 842, 846, 854 (Md. 1975), the Maryland Court of Appeals found that where an insurer "secured counsel to defend the suits" against the insured, but did not waive its right to deny coverage, the insured was still entitled to reasonable attorney's fees which she incurred in successfully defending against the declaratory action brought by the insurer. *See United States Fire Insurance v. Clendenin Brothers, Inc.*, Civ. Action No. MJG-03-3308 (D. Md. Oct. 17, 2006) (relying on *Brohawn* to find that Maryland law allows an insured to recover attorney's fees and costs related to defending against a declaratory action filed by an insurer, even where the insurer continues to provide a defense against third-party claims).[2]

Although Zurich attempts to distinguish the facts at issue here from those in *Brohawn*, the court does not find those distinctions accurate or compelling. Zurich contends that, unlike here, the insurer in *Brohawn* did not fulfill its duty to defend the insured, because the insurer offered arguments in its declaratory action that, if successful, would have significantly prejudiced the insured's defense in the ongoing third-party litigation. The *Brohawn* insurer's arguments in a separate declaratory action, however, do not establish that the insurer failed to fulfill its duty to defend the insured in the underlying action. To the contrary, *Brohawn* specifically noted that the insurer was providing a defense for the insured in the underlying

[2] While not precedential or otherwise binding, the *Clendenin Brothers* opinion may be cited as support for this court's similar reasoning.

litigation and yet still granted the insured attorney's fees for having to defend against the declaratory action. *Id.* at 846, 854.

The outcome in *Brohawn* is fully consistent with the principle originally established in *Cohen* that an insured, who is merely trying to receive the insurance coverage he paid and bargained for, should be entitled to recover fees and costs associated with successfully defending against a declaratory action filed by an insurer hoping to avoid payment. In considering the declaratory action exception to the American rule, it has been noted that "declaratory judgment proceedings are financially costly and can be particularly damaging to an insured's expectations and needs given that they arise at the very time that the insured is seeking the protection of insurance shortly after having suffered a loss." COUCH § 233:73; *see also Hegler v. Gulf Insurance Co.*, 243 S.E.2d 443, 444 (S.C. 1978) (citing *Cohen* in finding that because an insurer's undertaking of a "defense under a reservation of rights until a declaratory judgment action is prosecuted" amounts to a "wrongful breach of its contractual obligation to defend," the insured is entitled to the legal fees related to successfully defending against the declaratory action). Furthermore, were the court to find that Fieldstone is not entitled to recover fees and costs related to defending against the declaratory action, insurers would be able to circumvent the principle articulated in *Cohen* by shifting the cost of even an unsuccessful declaratory action back onto the insured. For the foregoing reasons, Zurich's motion for reconsideration and/or certification of a question of law to the Maryland Court of Appeals will be denied.

A separate order follows.

March 24, 2008
Date

/s/
Catherine C. Blake

United States District Judge

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ORDER

For the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that the plaintiff's motion for reconsideration (docket entry no. 27) is **DENIED.**

March 24, 2008
Date

/s/
Catherine C. Blake
United States District Judge